

MEMORANDUM

To: Honorable Mayor and City Council Members
cc: Pamela Antil, City Manager
From: Leslie E. Devaney, City Attorney and Christina M. Cameron, Deputy City Attorney
Date: October 13, 2021
Re: *Implementation of Voter-Approved Measure H*

Background and Questions Presented

At the November 3, 2020, regular municipal election, Encinitas voters approved Measure H (Ordinance 2020-18), which added Chapter 9.25 related to cannabis activity to the Encinitas Municipal Code. As required by law, Chapter 9.25 was added to the Code exactly as it was written and submitted to the City and adopted by the voters.

On August 11, 2021, the City Council adopted Ordinance No. 2021-04 related to implementation of Measure H. Ordinance No. 2021-04 identified specific commercial, industrial, and agricultural zones throughout the City in which cannabis activity would be permitted consistent with Measure H and repealed Encinitas' prohibition against cannabis activity in the City (EMC, Ch. 9.21) because it was in conflict with Chapter 9.25.

Full implementation of Measure H is deferred until approval by the Coastal Commission. Measure H provisions related to Industrial Hemp are deferred until the state adopts final regulations for Industrial Hemp production and licensing.

We have been asked to provide a legal review and guidance on several topics related to further implementation of Measure H:

1. Odor Management
2. Signage
3. Transfers of Ownership of Cannabis Businesses
4. Sensitive Uses
5. Limitations on what can be sold

Relevant Law

Elections Code

Elections Code section 9217 states: “No ordinance that is either proposed by initiative petition and adopted by the vote of the legislative body of the city without submission to the voters, or adopted by the voters, shall be repealed or amended except by a vote of the people, unless provision is otherwise made in the original ordinance.” To the extent that implementing guidelines or resolutions amend rather than clarify or implement a voter-approved enactment, they are invalid. *Tesoro Logistics, LLS. V. City of Rialto*, (2019) 40 Cal.App.5th 798, 806.

In general, courts have held that a legislative act improperly amends a voter-approved enactment when changes of the scope or effect; adds to or take something away; or is designed to change it by adding or taking from it some particular provision. *Id.*, at 806–807.

Ambiguities in voter-adopted ordinances may be clarified by legislative action in order to implement voters' intent. *Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, 1021-1022, emphasis added.

Therefore, to the extent that Measure H does not expressly allow the City to further regulate Cannabis Businesses or Industrial Hemp, the City’s implementation may clarify but may not amend the provisions of Measure H.

State Law

The Medicinal and Adult-Use Cannabis Regulation and Safety Act (Bus. & Prof. Code, § 26000 et seq.) (“MAUCRSA”) establishes: cannabis licensing requirements, rules for running a licensed cannabis business, what can and cannot be made into a cannabis product and what ingredients can and cannot be used, packaging requirements for cannabis products, testing that each product must pass before it can be sold, and enforcement that may be taken if a business is not following state law and guidelines.

State law also: establishes rules to prevent people under the age of 21 from getting cannabis, limits how much cannabis a person can carry at a time, and establishes requirements for medicinal cannabis. See generally Hlth. & S. Code, §§ 11357 – 11362.9. For example, state law bans the sale and possession of “synthetic cannabinoid compounds.” Hlth. & S. Code, § 11357.5. Synthetic Cannabinoids include the brand “Spice” and are sometimes referred to as “incense” or “synthetic marijuana” and an ever-changing list of slang or nick names. These are synthetic

substances that claim to mimic the effects of THC (the psychoactive component in Cannabis). Their contents are unknown and their effects are unpredictable and dangerous.¹

State laws related to Industrial Hemp are contained in Division 24 of the Food and Agriculture Code.

For convenience, these laws will be referred to collectively as “State Cannabis and Industrial Hemp Laws.”

Measure H Provisions

Measure H describes five types of Cannabis Businesses: retail, cultivation, product manufacturing, cannabis kitchens and distribution. Meas. H, § 1. Cannabis Businesses are those that are lawful under MAUCRSA and state rules regulations implementing those laws. Id. Under Measure H, all types of Cannabis Businesses are subject to “any relevant city municipal codes including the Design Review process as defined by Chapter.23.08 of the Encinitas City Code, as well as the Special Purpose Overlay Zone regulations as defined by Chapter 30.34 of the Encinitas City Code.” [Meas. H, § 7(g).] In addition, rules, regulations, and local permitting requirements imposed by the City on a retailer, cultivator, a manufacturer, cannabis kitchen or distributor must “conform to the State licensing requirements for a retailer, as set forth by the California Business and Professions Code, Division 10, and state rules and regulations implementing those laws.” [Meas. H, § 2(i)(a), 3(j), 4(g), 5(h), and 6(d).]

“Industrial Hemp” is separately defined under state law² and separately regulated under Measure H. Under Measure H, Industrial Hemp must be allowed in agricultural zones, and must be cultivated in compliance with the California Food and Agricultural Code, Division 24, “as well as all relevant regulations for agriculture and agricultural products in the Encinitas City Code.” [Meas. H, § 8.]

Under Measure H, a business license for either a Cannabis Businesses or Industrial Hemp “may be revoked or suspended due to legitimate loitering, significant smell, or noise complaints, upon City confirmation of the significant smell, noise, or loitering; non- compliance with the regulations specified in [Measure H], ...; or noncompliance with other applicable state or local regulation.” [Meas. H, §§ 7(f), 8.]

¹ SB-1283 (2013-2014 legislative session) bill analysis before the Assembly Committee on Appropriations for hearing date August 6, 2014. Accessible at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201320140SB1283#

² Industrial Hemp is generally defined as a fiber or oilseed crop, or both, that is limited to types of the plant Cannabis sativa L. having no more than three-tenths of one percent (0.3%) tetrahydrocannabinol THC, the psychoactive component of cannabis.

Analysis

Local Regulation Generally

The City may generally implement, update, and impose its Municipal Code including but not limited to its land use and development and permitting requirements as well as nuisance regulations as to Cannabis Businesses or Industrial Hemp operator as it does with other businesses so long as they are not in conflict with State Cannabis and Industrial Hemp Laws.

In addition, the City may not establish and impose its own rules as to those matters addressed in State Cannabis and Industrial Hemp Laws. This includes, for example, limitations on what types of products can be sold at cannabis retail locations. To the extent a product is legal for a state licensed retailer to sell, it cannot be prohibited by local regulation in the City of Encinitas.

Odors

As described above, Measure H prohibits odors constituting nuisances as well as “significant smells” emanating from a Cannabis Business or Industrial Hemp operator with a City business license.

In addition, the Zoning Code provides “performance standards” to determine compatibility between uses of land and buildings. As to odors, EMC § 30.40.010 G provides as follows:

1. Odors from gases or other odorous matter shall not be in such quantities as to create unreasonable odors at or beyond the lot line of the use.
2. Toxic gases or matter shall not be emitted which can cause any damage to human health, animals, vegetation, or other forms of property or which cause soiling beyond the lot lines of any use.
3. Applications for development proposals and/or use permits shall be evaluated for their potential to create odors that are offensive or inconsistent with the surrounding land use.
4. Applications for development proposals and/or use permits shall be evaluated for their potential to increase the level of air pollution and/or particulates and shall be reviewed by Air Pollution Control District (APCD) when warranted.

Pursuant to the express provisions of Measure H, Cannabis Businesses and Industrial Hemp are subject to the Zoning Code and their licenses may be revoked for failure to operate in compliance with the Code.

Signage

Measure H establishes signage requirements for Cannabis Businesses. For example, retailers are required to post signs on the outside of the business with the contents limited to the name of the business in only two colors.” [Meas. H, § 2(g)]. In addition to these limitations imposed by Measure H, the Encinitas Municipal Code (“EMC”) contains general regulations related to the size placement and number of signs. See generally EMC § 30.60.050. The City’s signage regulations are enforceable in addition to the particular restrictions in Measure H so long as they do not conflict with state laws related to cannabis or Industrial Hemp or the specific rules contained in Measure H.

Business names are generally protected under the First Amendment. Any restriction (whether narrowly applied to Cannabis Businesses or broadly applied to any business in the City) would have to be able to stand up to strict scrutiny, which requires that there be a "compelling governmental interest," and that the restriction be narrowly tailored to achieve that interest. This is the highest and most stringent standard. In 2019, the Supreme Court addressed the issue of business names overturning a longstanding bar on the registration of “immoral” or “scandalous” trademarks as discriminating on the basis of viewpoint and, thus, in violation of the First Amendment. *Iancu v. Brunetti* (2019) 139 S.Ct. 2294. In that case, the majority opinion called out previously rejected trademark names that referred to drugs or drug use as examples of specific improper viewpoint-based restrictions. In the fraught arena, we strongly recommend the City adhere to time, place, and manner regulatory controls.

Transfers of Ownership

One of the goals stated in Measure H is “to provide for the zoning of retailers, cultivation, product manufacturing, and distribution in such a manner as to limit the impact on the City generally and residential neighborhoods in particular.”. It establishes specific rules and procedures aimed at achieving this goal.

Measure H does not explicitly address transfers of ownership. However, it does contain several limitations on who can operate a Cannabis Business in the City of Encinitas. In order to ensure that Cannabis Businesses and Industrial Hemp licensees are in compliance with these limitations, at a minimum, the City will need to know and approve changes of ownership.

Measure H also establishes a preference system and lottery to determine which businesses are permitted to apply for a limited number of retail Cannabis Business licenses. Importantly, Measure H also provides:

“If an applicant selected in the lottery is unable to comply with the regulations and requirements outlined in this ordinance in order to obtain a business license from the City

within eighteen (18) months of being selected, their selection shall be retracted, and a subsequent registration period shall occur and lottery shall be held for the opportunity to obtain the forfeited business license.”

It is reasonable to interpret this requirement as ensuring Cannabis Businesses issued a license are of the highest quality thus limiting the impact of these types of businesses on the City.

The requirement to repeat the registration, priority and lottery process in this situation would be improperly circumvented if, through a change of ownership, a Cannabis Business with a lower priority ranking or one that was unsuccessful in the lottery could simply buy its way into the application process. Therefore, where priority rankings and a lottery are in play, the City can and should prohibit changes of ownership at least until a license has been issued. After issuance, the City may also limit ownership changes to individuals who would meet the same priority classification as the original ownership.

Sensitive Uses

Under Measure H, Retailers must maintain a 1,000-foot separation from sensitive uses. A Sensitive Use is defined in Measure H as “a day care center, playground, other retailer, or school.” Schools are defined as “any public, or private, accredited institution of learning providing instruction in kindergarten or grades 1 to 12” but not a “private school in which education is primarily conducted in private homes.”

The distance between a Cannabis Business and a Sensitive Use is to be measured by a “straight line from the closest property lines of the premises to the closest property line of the sensitive use. The measurement of distance between uses will take into account natural topographical barriers and constructed barriers such as freeways, flood control channels, or railroad tracks without pedestrian or automobile crossings that would impede direct physical access between the uses. In such cases, the separation distance shall be measured as the most direct route around the barrier in a manner that establishes direct access.” [Meas. H, § 2(b).] The list of topographic barriers in Measure H is illustrative and not exclusive. Therefore, in assessing the eligibility of any specific location, the City will have to assess whether any particular barrier impedes direct physical access. It is not possible in the absence of a specific application to create an exhaustive list of barriers that would meet this standard.

Under state law, the premises of a licensed Cannabis Business may not be located within a 600-foot radius of a school providing instruction in kindergarten or any grades 1 through 12, daycare center, or youth center that is in existence at the time the license is issued. Bus. & Prof. Code, § 26054(b). “Youth center” means any public or private facility that is primarily used to host recreational or social activities for minors, including, but not limited to, private youth membership

organizations or clubs, social service teenage club facilities, video arcades, or similar amusement park facilities. Hlth & Saf. Code, § 11353.1; see also, Bus. & Prof. Code, §§ 26054(b), 26001; 4 CCR, § 16102.

Limitations on What Can Be Sold

What may be sold at a cannabis retailer is within the subject matter of State Cannabis and Industrial Hemp Laws. To the extent a product is legal for a state licensed retailer to sell, it cannot be prohibited by local regulation in the City of Encinitas.

Conclusion

The City may generally implement, update, and impose its Municipal Code including but not limited to land use development and permitting requirements as well as nuisance regulations as to Cannabis Businesses and Industrial Hemp so long as those Municipal Code provisions are not in conflict with State Cannabis and Industrial Hemp Laws. This includes Zoning Code performance standards related to Odors, Toxic Gases, and Other Airborne Pollutants (EMC § 30.40.010) and signage regulations (EMC, Ch. 30.60). To ensure the intent of Measure H is followed, transfers of ownership should be prohibited until a business license is issued and the City should reserve the right to review and approve any subsequent change of ownership. In addition to sensitive uses listed in Measure H, state law prohibits Cannabis Businesses within 600 feet of any youth center. Conformance with the 1,000-foot buffer contained in Measure H will have to be assessed on a case-by-case basis given the need to take into account topographical barriers. Regulation related to the types of products that may be sold at cannabis retailers is a matter under the control of the state and may not be further regulated by the City.